Single Bench

IN THE HONOURABLE HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 855 OF 2005

APPELLANT/ACCUSED : (IN JAIL)

Maichal (Mayeekal) Toppo; aged about 20 years; Son of Shri Silbestar Toppo; Occupation Forming, Resident of Village Kurmapara, Salkadand; Police Station Bageecha; District Jashpur (C.G.).

4290/05

Filed on 23/11/05 Counsel

by Shri Atul Advocate

R/o D.R. (J) 23/11/05

VERSUS

RESPONDENT : State of Chhattisgarh; through Police Station Bageecha; District Jashpur (C.G.).

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CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE, 1973

(21)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 855/2005

Maichal Toppo

Vs.

State of Chhattisgarh

Single Bench: Hon'ble Justice Shri Dilip Raosaheb Deshmukh.

Shri R.N. Jha, learned counsel for the appellant.

Shri U.R.S. Chandel, learned Panel Lawyer for the State.

JUDGMENT

(Delivered on 01-02-2006)

1. This appeal is directed against the judgment dated 16.11.2005 delivered by Shri G.C. Bajpayee, Sessions Judge, Jashpur (CG) in Sessions Trial No. 54/2005 whereby the appellant was convicted under Section 304 Part-II of I.P.C. and was sentenced to undergo rigorous imprisonment for five years.

2. Briefly stated the prosecution story is that the appellant is the son of Silbester P.W. 1. Deceased Silbina was the mother of the appellant. On 4.3.2005, at about 8.00 a.m. while Silbester was sleeping at his house, the appellant came home and assaulted Silbina. Hearing the noise, Silbester P.W.1 got up. Samera, daughter of Silbester told him that the appellant had killed her mother. Silbester saw that Silbina was lying on the ground and asking for water. He asked the appellant as to why did he beat his mother. The appellant said that since his mother had not prepared food, therefore, he had assaulted her with fists and kicks. Silbina succumbed to the injury on 5.3.2005 at about 4.00 a.m. F.I.R. was lodged by Silbester on 5.3.2005 at 11.00 a.m. at P.S. Bageecha vide Ex.P-1.

Merg intimation Ex.P-2 was registered and inquest on the dead body of Silbina was conducted vide Ex.P-5. On postmortem examination, Dr. Shankuntala Nikunj P.W. 4 found that there were 2 bruises on the left side and middle of the chest. A cluster of finger marks were present over both sides of her neck. A bruise 2cm x 2cm was also present over the right pre-aricular region. Multiple abrasions were present on the right ear lobule. A lacerated wound about 2cm x 1cm was present on the left parietal region with oozing of blood. Boggy swelling about 4cm x 3cm was present around the lacerated wound mentioned above. There was an abrasion about 9cm over right knee. Upon internal examination, she found that there was facture of 4th & 5th rib on the right side of the chest. She opined that death of Silbina was due to asphyxia and compression of chest and neck and was homicidal in nature. After completion of investigation, the appellant was prosecuted and charged under Section 302 of I.P.C. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined 5 witnesses. The learned trial Judge relying upon the evidence adduced by the prosecution convicted and sentenced the accused/appellant as shown in para 1 Supra.

3. Learned counsel for the appellant has contended that there was not even an iota of evidence to prove the guilt under Section 304 part-II of I.P.C. against the accused/appellant and the learned trial Judge had convicted the accused/appellant merely on conjectures and surmises. On the other hand, Shri U.K.S. Chandel, learned Panel Lawyer appearing for the State argued in support of the impugned judgment.

4. The testimony of Dr. Shakuntala Nikunj P.W. 4 proved beyond doubt that on conducting postmortem examination, she had found injuries mentioned in paragraph 2 on Smt Silbina and had opined that death was homicidal and had been caused within 24 to 36 hours prior to the postmortem examination. Thus, it is established beyond doubt that death of Silbina was homicidal in nature. The only point which requires consideration is whether the appellant is the author of the crime. Silbester P.W. 1, the father of the appellant stated that Silbina had consumed excessive liquor due to which she had died. He was cross examined by the Additional Public Prosecutor but nothing could be elicited to support the prosecution story. In further cross-examination by the defence, he has stated that Silbina was alcoholic and had consumed alcohol on the date of occurrence and had a fall near the door and was asking for water. He has also stated that Silbina always used to complain of pain in the chest. In para 8, he has also stated that the appellant was not at home on the date of occurrence and had gone to the house of one Amrut and had come on being informed about the death of his mother.

5. The next witness Fabiyanus P.W. 2 has also stated that Silbester had told him that Silbina had a fall whereupon he went to his house and offered water to Silbina and returned home. Nothing could be elicited by the Additional Public Prosecutor in cross-examination to support the prosecution story. In further cross-examination by defence, this witness has also stated that Silbina used to consume excessive alcohol due to which she used to complain of pain in the chest. He further stated that due to consumption of excessive alcohol, she used to fall anywhere whereupon people would lift her and reach her home.

He also stated that the appellant never quarreled with Silbina.

6. Pramod Kumar Singh P.W. 3 is the *Patwari* who had prepared the spot map vide Ex.P-7. The testimony of Dr. Shakuntala Nikunj P.W. 4 has already been referred above. The last witness R.C. Ram, A.S.I. P.W. 5 has proved the F.I.R. lodged by Silbester Ex.P-1. However, it is settled law that F.I.R. is not a substantive piece of evidence and could only be sued for the purposes of corroboration or contradiction. The learned trial Judge has convicted the accused/appellant merely on the basis of the F.I.R. Ex.P-1. This approach of the learned trial Judge is wholly erroneous and contrary to law. There was not even an iota of evidence to establish that the accused/appellant had assaulted his mother Silbina resulting in her death. Conviction of the appellant under Section 304 part-II of I.P.C. and the sentence imposed thereunder on the appellant by the Sessions Judge, Jashpur therefore deserves to be set aside.

7. In the result, the appeal is allowed. Conviction of the appellant under Section 304 part-II of I.P.C. and the sentence imposed thereunder are set aside. The appellant is acquitted. If not required in any other case, the appellant shall be set at liberty forthwith.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Priya